Re Aris bin Massod; ex p UOL Factoring Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D5-29-2585 OF 1997
STEVE SHIM J
28 MAY 1998

Bankruptcy *— Notice — Whether there can be extension of notice — Whether iscretionary power of court to extend time to be exercised — Bankruptcy Rules 1969, r 96 — Bankruptcy Act 1967, s 93(4)*

Bankruptcy *— Notice — Substituted service — Order for — Failure to comply with Practice Note No 1 of 1968 — Only one call made on judgment debtor — Whether order valid*

The judgment creditor had filed a bankruptcy notice against the judgment debtor in October 1997. On 9 December 1997, the judgment creditor obtained a court order extending the bankruptcy notice for 12 months as well as an order to have the said notice served on the judgment debtor by way of substituted service. The judgment debtor made an application to have the orders set aside which was dismissed. This is an appeal against that dismissal.

In an affidavit in support of the judgment creditor's case, it was claimed that a call had been made on the judgment debtor on 16 November 1997 in an attempt to serve a bankruptcy notice on him. Being unsuccessful in this attempt, a letter of appointment was issued to the judgment debtor indicating that a call would be made on the judgment debtor on 3 December 1997. This letter was returned by the postal service marked 'keluar'. The call on 3 December never materialized.

The judgment debtor's appeal is based, inter alia, on the following grounds: (i) that the application for the extension of the bankruptcy notice is flawed; (ii) that the order for the substituted service is invalid; and (iii) that the order for the extension of the bankruptcy notice is null and void.

Held, allowing the appeal:

The proposition raised by the judgment debtor, that the application for the extension of the bankruptcy notice is flawed, has no merit and must fail. Whilst r 96 of the Bankruptcy Rules 1969 relate specifically to the service of the bankruptcy notice within three months from the issue thereof subject to the power of the court to extend such time for the service, such an application can be dealt with under the discretionary powers of the court provided under s 93(4) of the Bankruptcy Act 1967 (see p 361E)

The application for the bankruptcy notice to be served on the judgment debtor by way of substituted service should have been

refused as the judgment creditor had not complied with the guideline set out in Practice Note No 1 of 1968 which prescribes for at least two calls to be made on the judgment debtor. Therefore, the order for substituted service of the bankruptcy notice should be set aside (see pp 362I–364A).

The order for substituted service of the bankruptcy notice having been set aside, it follows that the order for the extension of the bankruptcy notice obtained thereafter is also invalid and ought to be set aside (see p 364A).

[Bahasa Malaysia summary

Pemiutang penghakiman telah memfailkan suatu notis kebankrapan terhadap penghutang penghakiman pada Oktober 1997. Pada 9 Disember 1997, pemiutang penghakiman memperolehi perintah mahkamah melanjutkan notis kebankrapan tersebut untuk 12 bulan lagi di samping suatu perintah untuk menyampaikan notis tersebut kepada penghutang penghakiman melalui cara penyampaian ganti. Penghutang penghakiman membuat permohonan untuk mengketepikan perintah-perintah tersebut yang mana telah ditolak. Ini ialah rayuan terhadap penolakan tersebut.

Di dalam afidavit yang menyokong kes pemiutang penghakiman, adalah didakwa bahawa suatu kunjungan telah dibuat kepada penghutang penghakiman pada 16 November 1997 di dalam suatu cubaan untuk menyampaikan notis kebankrapan tersebut pada beliau. Di atas kegagalan di dalam cubaan ini, suatu surat janji temu telah dikeluarkan kepada penghutang penghakiman menunjukkan bahawa suatu kunjungan akan dibuat kepada penghutang penghakiman pada 3 Disember 1997. Surat ini dikembalikan oleh perkhidmatan pos ditandakan 'keluar'. Kunjungan tersebut pada 3 Disember tidak menjadi kenyataan.

Rayuan penghutang penghakiman adalah berdasarkan, antara lain, pada alasan-alasan berikut: (i) bahawa permohonan untuk perlanjutan notis kebankrapan tersebut mengandungi kecacatan; (ii) bahawa perintah untuk penyampaian ganti adalah tak sah; dan (iii) bahawa perintah untuk perlanjutan notis kebankrapan tersebut adalah batal dan tak sah.

Diputuskan, membenarkan rayuan tersebut:

Usul yang ditimbulkan oleh penghutang penghakiman, bahawa permohonan tersebut untuk perlanjutan notis kebankrapan tersebut mengandungi kecacatan, tidak bermerit dan seharusnya gagal. Walaupun k 96 Peraturan-Peraturan Kebankrapan 1969 berkaitan dengan spesifik penyampaian notis kebankrapan dalam masa tiga bulan daripada keluaran itu tertakluk kepada kuasa mahkamah untuk melanjutkan masa sedemikian untuk penyampaian, permohonan sedemikian boleh ditangani di bawah kuasa-kuasa budi bicara

mahkamah yang diperuntukkan di bawah s 93(4) Akta Kebankrapan 1967 (lihat ms 361E). A

Permohonan untuk menyampaikan notis kebankrapan tersebut ke atas penghutang penghakiman melalui cara penyampaian ganti seharusnya ditolak memandangkan pemiutang penghakiman tidak mematuhi dengan garis panduan yang dinyatakan di dalam Nota Amalan No 1 1968 yang menetapkan untuk sekurang-kurangnya dua kunjungan dibuat ke atas penghutang penghakiman. Maka perintah tersebut untuk penyampaian ganti notis kebankrapan tersebut seharusnya diketepikan (lihat ms363I–364A). B

Perintah untuk penyampaian ganti notis kebankrapan tersebut telah diketepikan, maka adalah diikuti bahawa perintah untuk perlanjutan masa notis kebankrapan yang diperolehi selepas itu adalah juga tak sah dan seharusnya diketepikan (lihat ms 364A).] C

Notes

For cases on substituted service, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1245–1248. D

Legislation referred to

Bankruptcy Act 1967 s 93(4) E
Bankruptcy Rules 1969 r 96

Richard Lee (*Cheah Teh & Su*) for the appellant.
SC Tan (*Kumar Jaspal Quah & Aisah*) for the respondent.

Steve Shim J: This is an appeal by the judgment debtor ('JD') against the decision of the learned Senior Assistant Registrar ('SAR') dismissing with cost the application by way of summons-in-chambers taken out by the JD against the judgment creditor ('JC') seeking inter alia, to set aside the order for extension of the bankruptcy notice ('BN') as well as the order for substituted service of the same (see encl 15). The said summons-in-chambers is supported by the affidavits of the JD and his wife. The JC has opposed the application and in so doing has filed four affidavits all affirmed by Wan Kam Man, the Assistant Manager of the Credit Control Department of the JC. F G

On 31 October 1997, the JC filed a BN against the JD. On 9 December 1997 the JC obtained a court order extending the BN a further period of 12 months with effect from 30 January 1998 as well as an order to have the said BN served on the JD by way of substituted service. The application by the JD to set aside the above orders was dismissed by the learned SAR. Hence this appeal. The appeal was heard by me on 28 May 1998 at the conclusion of which I allowed the appeal. I stated that further grounds may be given in the event of an appeal. As an appeal has been lodged, I now state the further grounds involved. H I

The appeal is grounded on four points, namely: (1) that the application for extension of the BN is flawed; (2) that the order for substituted service

of the BN is invalid; (3) that the order for extension of the BN is null and void; and (4) that the bankruptcy proceedings should be staged. For the purpose of this appeal, it is sufficient to deal with the first three points.

The first point can be dealt with briefly. It relates to the proper construction of R 96 of the Bankruptcy Rules 1969, which stipulates:

> Duration of notice
>
> Subject to the power of the Court to extend time, a bankruptcy notice to be served shall be served within three months from the issue thereof.

Mr Lee, counsel for the JD has submitted that r 96 merely provides for an extension of time to serve the BN and does not in effect provide for the extension of the BN itself. Mr Tan for the JC has contended otherwise saying that the key is to be found in the words 'issue thereof". In my view, the wordings in r 96 are sufficiently clear. They relate specifically to the service of the BN within three months from issue thereof subject to the power of the Court to extend such time for service. They do not provide for the extension of the BN itself. However, such an application can be dealt with under the discretionary powers of the court provided in s 93(4) of the Bankruptcy Act 1967 which states:

> Where by this Act or by general rules the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration thereof, upon such terms, if any, as the court seems fit.

Thus, having regard to the provisions of s 93(4) and r 96 aforesaid, I am of the view that the application taken out by the JC in this case is not irregular or defective. In the circumstances, the first point or proposition raised by the JD has no merit and must fail.

The second point taken by the JD is more substantial. Here, the JD has contended that the order for substituted service of the BN is invalid and therefore ought to be set aside for failure to comply strictly with the Practice Note No 1 of 1968 which stipulates as follows:

> Application for Substituted Service in The High Court in Malaya
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> The practice governing applications for substituted service in the High Court in Malaya shall follow that in the High Court in England, as provided for in O 10 r 2 of the Rules of the Supreme Court 1975. The practice, taken from the 1957 White Book, p 88 is here reproduced.
>
> 1 Two calls should be made.
>
> 2 The calls should be made at the defendants' residence, permanent or temporary, if known; otherwise, or if the claim relates to the defendant's business, at his business address. If the defendant has left the address given on the writ, this should be stated in the affidavit. If a copy of the document to be served is left, it must be in a sealed envelop addressed to the defendant.
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> 3 The calls should be made on weekdays and at reasonable hours.
>
> 4 Each call should be on a separate day.
>
> 5 The second call should be made by appointment by letter sent to the defendant by ordinary prepared letter post, giving not less than two clear

days' notice, enclosing a copy of the document to be served, and offering an opportunity of making a different appointment.

6 On keeping the appointment, the process server should inquire whether the defendant has received the letter of appointment with the copy document, and if it is stated that the defendant, is away, inquiry should be made whether or not letters are being, or have been forwarded to an address within the jurisdiction; the object is to show that the defendant has received communications sent to him.

7 The affidavit in support of the application should deal with all the foregoing requirements and should further state whether the letter of appointment has been returned or not, and any answer received should be exhibited. A copy of the document to be served should accompany the affidavit.

No prescribed form is necessary for the letter of appointment.

The letter of appointment should ordinarily be sent by the solicitor for the plaintiff after ascertaining from the process servers in the High Court and other courts their available times and dates from the second call. The facts regarding the letter of appointment should be stated in the affidavit in support.

Compliance with the above practice will ensure that the application for substituted service will be grounded on other than a mere statement that the defendant is evading service. Such a statement should never be sufficient to apply for an order for substituted service. If the above practice is followed as required by the Rules of the Supreme Court 1957, the efforts which have been made to find the defendant and the reasons for believing that he is keeping out of the way to avoid service will be before the Senior Assistant Registrar/Assistant Registrar before the order is made.

(Au Ah Wah)
Registrar
The High Court Registrar,
The Law Courts, Kuala Lumpur
10 June 1968

Given the guidelines provided in the Practice Note above, what then is the position taken by the JC? Here I would refer to para 4 of Ong Eng Hee's affidavit in support of the JC's application to serve the BN on the JD by way of substituted service which states that he (Ong) had made all reasonable efforts and used all due means in his power to serve the JD with a true copy of the BN but was unable to do so. By 'all reasonable efforts' it seems clear that he is referring to his attempt to serve the BN on the JD on 16 November 1997 and to what had transpired after the the solicitors for the JC had issued a letter of appointment on 17 November 1997. This is reflected in paras 2 and 3 of his affidavit which state:

2 Having been directed to serve the Judgment Debtor abovenamed with a copy of the Bankruptcy Notice in this action which appeared to me to have been regularly issued out of and under seal of the court by the Judgment Creditor abovenamed against the Judgment Debtor abovenamed and dated 31 October 1997, I attended on the 16 November 1997 at about 3.30 pm for the purpose of serving the Bankruptcy Notice

A on the Judgment Debtor at No 2 Lengkok Aminuddin Baki, Taman Tun Dr Ismail Kuala Lumpur but was unsuccessful as I was informed that the Judgment Debtor was not in.

3 On 17 November 1997, solicitors for the Judgment Creditor Messrs Kumar Jaspal Quah & Aishah issued Letter of Appointment to the Judgment Debtor under cover of AR Registered post enclosing therein B copies of the Bankruptcy Notice for his attention. The said appointment was that I would be calling on the Judgment Debtor on 3 December 1997 at about 2.30 pm to 3.30 pm to effect personal service of the Bankruptcy Notice on the Judgment Debtor. However, the said letter was returned by the postal authorities with the remark 'keluar'.

C Reading those passages closely, it would seem that only one call was made by the process server Ong Eng Hee and that was on 16 November 1997. On 17 November 1997, the solicitors of the JC had issued a letter of appointment to the JD indicating that Ong would be calling on him (JD) on 3 December 1997 between 2.30 pm and 3.30 pm. However, that call never materialized probably because the JC or Ong thought or assumed it was not D necessary as the letter of appointment was returned with the remark 'keluar'. In my view, that assumption is quite unjustified — the mere fact that the said letter of appointment was returned with the remark 'keluar', did not necessarily lead to the conclusion that the JD would not be in on 3 December 1997 if Ong had made the call on that day. There is no indication from the said letter or the postal authorities that the JD would not E be in on 3 December 1997. In any event, notwithstanding the return of the said letter of appointment, I would have thought it fair and reasonable that Ong should have made the call either on 3 December 1997 or any other date. This he did not. Thus, in effect only one call was made which is hardly sufficient in the circumstances. The Practice Note has prescribed for at least F two calls to be made. It also provides that during the second call, if the defendant is away, the process server should make some form of inquiry as to the whereabouts of the defendant. If, in this case, Ong had made the call on 3 December 1997 and found the JD to be out, he would reasonably have inquired whether for example the address given was the proper forwarding address of the JD.

G Furthermore, the first call made by Ong on 16 November 1997 is not entirely clear. According to him, the call was unsuccessful because he was informed that the JD was not in. There is no indication as to who had informed him or how the information was actually conveyed or communicated to him. I think it important to state the name of the person H from whom he obtained the information as well as that person's relationship to the JD in order to establish reliability. In the absence of these particulars, I would have doubts about whether there was any call on 16 November 1997 as alleged or if there was one, whether it was made effectively or in a satisfactory manner.

In summary therefore, having regard to all the circumstances, I do not I think that the JC had complied with the guideline set out in the Practice Note No 1 of 1968. Such contravention and/or non-compliance would have a debilitating effect upon the stand taken by the JC which in turn militates

against granting its application. For the reasons given, I hold that the application for the BN to be served on the JD by way of substituted service should have been refused and therefore the order granted thereunder is invalid and should be set aside. That being the position, it must follow that the order for extension of the BN obtained thereafter is also invalid and ought to be set aside.

It is for all the reasons stated above that I had, on 28 May 1998, allowed the appeal with costs.

Appeal allowed.

Reported by Joel Ng